NO. 83-982

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES DEAN BRIDGES
AND PERCY GARCIA,

PETITIONERS,

VS.

McLENNAN COUNTY, TEXAS,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the exclusionary rule applies to this civil interpleader suit prosecuted by the State of Texas and McLennan County (Texas) claiming possession or ownership to Five Hundred Thousand ($500,000.00) Dollars discovered by the minor Petitioners but illegally seized from them by the Waco City Police?

2. Whether the Petitioners were deprived of their property without due process of law and without equal protection of the laws since McLennan County did not prove the Petitioners stole the Five Hundred Thousand ($500,000.00) Dollars pursuant to Section 31.01 of the Texas Penal Code?

LIST OF INTERESTED PARTIES

1. James Dean Bridges and Percy Garcia are the minor Petitioners who discovered the money in issue.

2. The Internal Revenue Service, an Appellant in the Court of Appeals, sought to collect income tax from James Dean Bridges.

3. The State of Texas, Appellee in the Court of Appeals, claimed it, not McLennan County, was entitled to the money.

4. McLennan County, Appellee in the Court of Appeals, was awarded the money.

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REFERENCE TO OFFICIAL AND UNOFFICIAL OPINIONS BELOW

1. The unpublished opinion of the United States District Court for the Western District is included in the appendix.

2. *City of Waco, Texas, et al v. Bridges, et al,* 710 F.2d 220 (5th Cir., 1983)

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals

was rendered and entered on July 28, 1983. The Appellant's Motions for Rehearing and Rehearing En Banc were denied on September 16, 1983.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourth Amendment of the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment of the United States Constitution:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

Tex. Penal Code Ann. §31.03 (Vernon 1974). Theft

The article is reproduced in the appendix.

Tex. Crim. Proc. Code Ann. §18.17 (Vernon 1977) Disposition of abandoned or unclaimed property.

The article is reproduced in the appendix.

Tex. Crim. Proc. Code Ann. §47.01 (Vernon 1977) Subject to Order of Court.

> "An officer who comes into custody of property alleged to have been stolen must hold it subject to the Order of the proper Court or Magistrate."

STATEMENT OF THE CASE

This is an interpleader action to decide the right of possession or ownership to Four Hundred Eighty Two Thousand Two Hundred Seventy Five Dollars and Sixty Seven Cents ($482,275.67), plus interest, and a 1977 Ford Thunderbird taken from James Dean Bridges and Percy Garcia in January, 1977.

In January, 1977, James Dean Bridges, fifteen (15) years of age, and Percy Garcia, sixteen (16) years of age, dug up an ice chest containing Five Hundred Thousand ($500,000.00) Dollars in cash on the ranch of James Hiroms, Bridges' father, near Alice, Texas. The boys put the money in two suitcases and took a bus to Dallas, Texas. In Dallas, the boys met a man named Gilbert Bailey and asked him to buy them a new car with money they gave him. Bailey bought a 1977 Ford Thunderbird with the title registered in his name.

After the purchase, James Dean Bridges and Percy Garcia left Dallas, Texas and were stopped late at night by a policeman in Waco, Texas for driving through a red traffic light. Since neither boy had a driver's license and both gave conflicting explanations as to their names and home addresses, the officer arrested them. Although there is a

dispute as to the place and time, the police conducted a search of the car, including the trunk and suitcases inside the trunk, and discovered the money.

After discovering the money, the Waco Police questioned the boys about the source of the money at the police station and McLennan County Juvenile Center during the night and next day. The boys gave several explanations, including "we found it", but the one the police accepted was "we stole it." At that time, the Waco Police officially took possession of the money and car pursuant to Article 47.01 of the Texas Code of Criminal Procedure.

No criminal charges for theft of the money or the car were ever filed against either boy, and no one has ever claimed ownership of this money except the parties to this law suit.

Basis Of Federal Jurisdiction

Soon after the seizure of the money, the Internal Revenue Service assessed Federal Income Taxes against James Dean Bridges and sought to levy upon the money. The City of Waco then interplead the proceeds in to the 19th State District Court of McLennan County, Texas, since the State of Texas, Internal Revenue Service and the boys were all claiming an interest in the money. The Internal Revenue Service then removed the case to the United States District Court pursuant to 28 U.S.C. §1441, §1444, §1446 and §2410. Thereafter, McLennan County intervened.

Trial And Appeal

At the trial the boys claimed ownership of the money

(and car) against everyone but the real owner, if any. The State of Texas and McLennan County said the boys stole the money and had no title to it and since the rightful owner did not claim it, one of them should get it under the escheat or abandoned property laws.

The boys sought to exclude the admission of the money, statements and other evidence because of an illegal search by the Waco Police. Judge Shannon ruled that while case law "pointed to the conclusion that the warrantless search...was an illegal search under the Fourth Amendment..." the officers searched in good faith and the evidence was therefore admissible.

The jury found tht the boys took the money "knowing or believing that the owner [could] be found." The money and the car were then awarded to McLennan County.

The Fifth Circuit affirmed the decision by concluding that the exclusionary rule does not apply in this civil case since (1) it was not a forfeiture or quasi criminal in nature and (2) the Waco Police would in no way be deterred from illegal searches since they made no claim to the money.

REASONS FOR GRANTING THE WRIT

1. The writ should be granted because this proceeding, although civil in form, was a forfeiture or quasi-criminal in substance, thus *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 85 S.C. 1246 (1965) applies.

2. If this proceeding was not a forfeiture or quasi-criminal, then the writ should be granted so this Court can

decide whether the exclusionary rule applies in a civil proceeding prosecuted by the State of Texas and the County of McLennan against two minors using evidence illegally seized by the Waco Police. See *United States v. Janis*, 96 S.C. 3021 (1976)

3. The writ should be granted because the boys were deprived of approximately Five Hundred Thousand ($500,000.00) Dollars by McLennan County, Texas without requiring the County to prove the boys committed the offense of theft.

ARGUMENT

1. Why Is This Case A Forfeiture Or Quasi-Criminal?

The reason is the County and State acted to take away from the boys the money and car by trying to prove the boys obtained the money by theft. For reasons stated later, they *never* proved the boys committed the offense of theft.

In Texas law, the boys have a superior interest in the money against all others except the real owner who has never come forth to claim the money. *Schley v. Couch*, 284 S.W.2d 333 (Tex. Sup. 1955). Only the State and County claimed a right to the money saying it was abandoned property. (How they know it was abandoned *after* the boys found the money, but not *before* is not clear!)

Forfeiture is simply a proceeding to take away property based on an act of omission or commission. There is an offense and a penalty. The criminal offenses the boys originally were charged with were driving through a red traffic light and not having a driver's license. The penalty

turned out to be the confiscation of over Four Hundred Eighty Two Thousand ($482,000.00) Dollars and a 1977 Ford Thunderbird automobile.

No criminal theft charges were ever filed. A civil suit reducing the State and County's burden of proof on the same question of theft was initiated against them.

In *One 1958 Plymouth*, this Supreme Court quoted Justice Bradley from the case of *Boyd v. United States* who said:

> "If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants,—that is, civil in form,—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one." (85 S.C. 1246, 1249)

Since the search of the boys' luggage was illegal, "[i]t would be anomalous indeed under these circumstances, to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible." *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 85 S.C. 1245, 1251.

2. The Application Of The Exclusionary Rule In This Civil Proceeding.

The Fifth Circuit Court of Appeals said in their opinion that (1) the Supreme Court has never applied the exclusionary rule in a civil case and (2) the deterrent benefit does not justify application in this case.

This Court wrote in *United States v. Janis*, 96 S.Ct. 3021 that evidence illegally seized by a state law enforcement officer, a Los Angeles Policeman, could be used in a civil tax case brought by the United States Government. The Court distinguished this "intersovereign" violation from "intrasovereign" violation cases that applied the exclusionary rule and concluded that the "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of state police so that it, outweighs the societal costs imposed by the exclusion." (96 S.C. 3021, 3032) The Court, however, reserved judgment on the rule's application involving intrasovereign violations. This case involves an intrasovereign violation or more specifically an intrastate violation. It involves cooperation among the law enforcement agencies of Waco City, McLennan County and the State of Texas.

Of course, several Federal Courts have excluded illegally seized evidence in civil cases involving intrasovereign violations. See *Pizzarello v. United States*, 408 F.2d 579 (2nd Cir. 1969) *cert. denied* 90 S.C. 481 (involving tax assessment for unpaid wagering taxes on money illegally seized by Special U.S. Treasury agents); *Vander Linden v. United States*, 502 F.S. 693 (S.D. Iowa 1980) (involving suit for tax refund where IRS agents

seized business records later used by other IRS people to impose tax); *Donovan v. Sarasota Concrete Company,* 693 F.2d 1061 (11th Cir. 1982) (involving exclusion of evidence illegally obtained by an O.S.H.A. compliance officer at an O.S.H.A. administrative hearing); and *Lopez-Mendoza v. Immigration and Naturalization Service,* 705 F.2d 1059 (9th Cir. en banc 1983) (involving exclusion of evidence illegally obtained by I.N.S. officers at deportation hearing).

The preceding federal cases involved intra-agency violations. Petitioners believe this case is the first to involve intrastate agencies.

Even if this is not an intrasovereign violation, the 2nd Circuit suggests that the application of the exclusionary rule in civil proceedings should not depend on whether there is an intersovereign or intrasovereign violation. *Tirado v. Commissioner,* 689 F.2d 307, 311, 313-314, (2nd Cir. 1982) *cert. denied* 103 S.C. 1256.

Petitioners believe the Waco Police would be deterred by the application of the exclusionary rule.

In *Lopez-Mendoza v. Immigration and Naturalization Service,* 705 F.2d 1059 (9th Cir. en banc 1983) the Court en banc gave three factors in deciding whether the exclusionary rule applies in any civil case:

> 1. The *connection* between those who illegally seized the evidence and those who seek to use it. Emphasis should be placed on the *purpose* of the agencies;
>
> 2. The *extent* the police are already subject to the deterrent effect of the rule; and

3. The deterrent effect weighed against the *cost to society.*

Considering these factors, how can the Fifth Circuit Court of Appeals say that the Waco Police would not be deterred by the application of the rule since they did not get the Five Hundred Thousand ($500,000.00) Dollars?

First, the connection among the Waco City Police, County and State was and is very close. When an arrest is made, the police turn all evidence over to the District (State) or County Attorney, depending on the type of offense, to decide whether any criminal action will be filed.

The purpose of the Waco Police Department's work in this case was, according to the trial and appellate courts, to investigate a possible theft of a 1977 Ford Thunderbird, and later, the theft of the money in issue.

No criminal complaint of theft was ever filed against the boys probably because the State and County Attorneys knew they could not prove the crime of theft since no owner could be found. If a complaint had been filed in a criminal court, a motion to suppress surely would have been filed and the police would have been frustrated if the motion would have been granted.

If the purpose of the exclusionary rule is to deter the police from illegal searches by excluding evidence in a criminal theft case, what good is done to allow the same illegally seized evidence into a civil proceeding to prove the identical offense of theft that could not be used in a criminal proceeding?

Furthermore, not excluding this evidence will only provide an incentive to police to violate the Fourth

Amendment. In other words, the police may be able to effectively stop or inhibit crime by illegally intruding into someone's home, car or personal possessions, and seizing what is suspected to be inside—drugs, gambling paraphernalia, money, and other forms of contraband whether derivative or per se. By taking these things away, the suspected criminal would be deprived of his money and equipment. Unfortunately, mistakes will be made and the cost to society will be greater by not excluding the evidence.

Lastly, in reply to the Fifth Circuit's opinion that the Waco Police would not be deterred since it did not receive the money, Petitioners assert the deterrent effect of the exclusionary rule works not only against one law enforcement agency such as the Waco Police Department, but against all law enforcement agencies generally. To tell one law enforcement agency that the evidence will not be used deters all agencies.

3. No Proof of Theft.

McLennan County took possession of the money and car pursuant to Article 47.01 of the Code of Criminal Procedure that states:

> "An officer who comes into custody of property alleged to have been stolen must hold it subject to the order of the proper Court or Magistrate."

Since the boys allegedly stole the money and the real owner never has claimed it, the County asserts it is entitled to possession under Article 18.17 of the Code of Criminal Procedure entitled "Disposition of abandoned or unclaimed property." This section essentially states that if no one

claims it, the County is entitled to the money.

The two problems with McLennan County's claim are:

1. The boys were never convicted of theft in a criminal court nor shown to have committed theft in a civil court; and

2. The County's claim that the money was abandoned is inconsistent with the claim it was stolen. Abandoned property cannot be stolen and there is no way to determine if the money was stolen before it was abandoned.

The reason the County never proved the offense of theft is because they (1) never proved there was an owner; nor (2) that the money was taken "without the effective consent of the owner" Article 31.03 Texas Penal Code; nor (3) that the crime was proven beyond a reasonable doubt.

The jury was asked these questions:

Question No. 1: Do you find from a preponderance of the evidence that James Dean Bridges intended to exercise control over the money in question, and did so, without the consent of the owner, knowing or believing that the owner of the money could be found? Answer "We do" or "We do not." We, the jury, answer we do. If you have answered Question No. 1 "We do not"; then answer Question No. 2. Otherwise, do not answer Question No. 2.

Question No. 2: Do you find from a preponderance of the evidence that the money in question was "mislaid" at the time James Lee Bridges and Percy Garcia dug it up? You are instructed that the term "mislaid" means money

which the owner intentionally places where he can again resort to it and then forgets where he placed it. Answer, "We do" or "We do not." We the jury answer _____.

These questions implied an owner. No inquiry was made if the money was abandoned *before* the boys discovered it. The Court assumed the money was abandoned *after* the boys discovered the money. Abandonment is a defense to the charge of theft. *United States v. Shackelford,* 667 F.2d 422 (5th Cir. 1982).

Nor was the jury asked if the money was taken without "the effective consent of the owner" which is a fundamental requirement according to the Texas Court of Criminal Appeals. *Bradley v. State,* 560 S.W.2d 650 (Tex. Crim. App. - 1978).

Lastly, the Trial Court submitted a jury question taken from *Williams v. State,* 268 S.W.2d 670 (Tex. Crim. App. - 1954) that did not represent the law of theft in Texas on the date of the boys' arrest or the trial. The question diluted the proof required by §31.01 of the Texas Penal Code.

Surely, the requirements of due process of law and equal protection of the laws warrant (1) proof of each and every element of the offense of theft, including an owner, whether or not in a criminal or civil proceeding, (2) the submission of a defensive issue on abandonment of the money; and (3) proof beyond a reasonable doubt.

CONCLUSION

WHEREFORE, Petitioners pray that a writ of certiorari be granted.

Kenneth R. Hannam,
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that three true and correct copies of this Petition for Writ of Certiorari have been mailed by certified mail, return receipt requested, to W. E. Haley, Attorney for McLennan County at 4800 Lakewood Drive, Suite Five, Waco, Texas 76710, this 13th day of December, 1983.

Kenneth R. Hannam

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1138

D.C. Docket No. W77-CA-27

CITY OF WACO, TEXAS, ET AL.,

Plaintiffs-Appellees,

versus

JAMES DEAN BRIDGES, ET AL.,

Defendants,

JAMES DEAN BRIDGES,
PERCY GARCIA and U.S.A.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is

hereby, affirmed;

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

JULY 28, 1983

ISSUED AS MANDATE:

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1138

CITY OF WACO, TEXAS, ET AL.,

Plaintiffs-Appellees,

versus

JAMES DEAN BRIDGES, ET AL.,

Defendants,

JAMES DEAN BRIDGES,
PERCY GARCIA and U.S.A.,

Defendants-Appellants.

Appeal from the United States District Court for the
Western District of Texas

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion July 28, 1983, 5 Cir., 198__, __ F.2d __)

(September 16, 1983)

Before RUBIN, GARZA and WILLIAMS, Circuit Judges

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "C"

CITY OF WACO, TEXAS, et al.,

Plaintiffs-Appellees

v.

James Dean BRIDGES, et al.,

Defendants,

James Dean Bridges, Percy Garcia and U.S.A.,

Defendants-Appellants.

No. 82-1138

United States Court of Appeals,
Fifth Circuit.

July 28, 1983

Civil interpleader action was brought to determine what party or parties were entitled to possession of $500,000 cash unearthed on a ranch and confiscated by city police following arrest of one of two boys who unearthed money. The United States District Court for the Western District of Texas, Fred Shannon, Jr., entered judgment finding money was payable to county government pursuant to a Texas statute. Appeals were taken. The Court of Appeals, Garza, Circuit Judge, held that: (1) exclusionary rule had no application to action; (2) city police officers, the seizing officers, were "state" officers within meaning of statute providing that unclaimed personal property seized by any state or county police officer would accrue to county

until true owner appeared, and thus county was entitled to possession of money; and (3) where United States offered no reason why new issue raised for first time on appeal was not presented below, even though United States admitted that its present theory was "consistent," albeit different, from that which it had previously urged, and new theory would have resulted in development of additional facts in trial court had it been presented there, United States' new theory would not be considered for first time on appeal.

Affirmed.

Kenneth R. Hannam, George W. Shaffer, Corpus Christi, Tex., Tony E. Duty, Waco, Tex., for Bridges.

Charles L. Barrera, Alice, Tex., for Garcia.

Glenn L. Archer, Jr., Asst. Atty. Gen., Michael L. Paup, Chief, Appellate Section, Carleton D. Powell, Libero Marinelli, Jr., Attys., Tax Div., Dept. of Justice, Washington, D.C., for U.S.

Keith Farr, Waco, Tex., for City of Waco.

Richard E. Gray, III, Asst. Atty. Gen., Austin, Tex., for State of Tex.

W. C. Haley, Waco, Tex., for McLennan County, Tex.

Appeals from the United States District Court for the Western District of Texas.

Before RUBIN, GARZA and WILLIAMS, Circuit Judges.

GARZA, Circuit Judge:

The City of Waco, Texas, brought this civil interpleader action to determine what party or parties were entitled to possession of some $500,000 cash unearthed on a ranch near Alice, Texas, and confiscated by Waco police following the arrest of appellant, James Bridges, on January 31, 1977. The district court found that the money was payable to the McLennan County government pursuant to a Texas statute. We agree and affirm; however, in some respects, we affirm on different grounds. We address initially the facts of this unusual case.

The Buried Treasure

In January 1977, appellants, fifteen-year-old James Dean Bridges and sixteen-year-old Percy A. Garcia, together with a friend dug up an ice chest containing approximately $500,000 in cash on the ranch of Bridges' father, James Hiroms, near Alice, Texas. Bridges testified at trial that he had accidentally discovered the money without knowing who had buried it, but in earlier statements to government agents had said that he had seen his father burying the money and that he believed the money was connected with his father's trafficking in marijuana. After digging up the money, the boys transferred it to two suitcases and drove to an Alice bus station where Bridges and Garcia boarded a bus for Dallas.

In Dallas, they registered at a hotel and visited various Dallas nightspots where they became acquainted with a man named Gilbert Bailey. They asked Bailey to purchase an automobile in their names, paid him $1,000 and purchased a 1977 Thunderbird. The automobile's title was in Bailey's name and had temporary dealer license

plates.

From Dallas, the boys had intended to travel north to Chicago, but became "confused" and instead began driving south. While proceeding through Waco, Texas, they were stopped by city police for going through an intersection on a red light. At the time, neither one possessed a valid driver's license, and neither was able to provide a satisfactory explanation for Bailey's title ownership nor for the temporary license plates. In addition, they provided the police with conflicting accounts as to their identities and places of residence.

Suspecting that the car was stolen, the police arrested the boys on charges of driving the automobile without an operator's license. Although record testimony is in dispute as to the timing, the police conducted an inventory search of the automobile, apparently at the police station, where they discovered the money.[1] No search warrant nor consent had been obtained prior to the search.

On February 4, 1977, the Internal Revenue Service made a termination assessment for federal income tax in the amount of $330,705.00 against Bridges covering the period January 1 through February 1, 1977, pursuant to § 6851 of the Internal Revenue Code (26 U.S.C.). In response, Bridges filed a petition for redetermination of the deficiency with the tax court, containing the factual allegation that the money had been stolen. Bridges later filed an amended

[1] By the time the money was discovered by police, a portion had been spent. Eventually, $482, 275.67 was deposited into the registry of the district court. Some $927.00 was retained as an exhibit. U.S. Marshals also took possession of a 1977 Ford Thunderbird purchased by the boys with money from the original find. For purposes of this opinion, we refer generally to the $500,000 as representing the funds on deposit in the registry of the court.

petition from which the allegation concerning the theft of the money was excluded. On February 4, the IRS served a notice of levy to the Waco police requiring the police to deliver to it such part of the seized money as was equal to the amount of the assessment. At about the same time, representatives of the government for the State of Texas advised the City of Waco that the State was also claiming the money.

On February 8, confronted with the conflicting claims of the IRS and the State, as well as those of Garcia and Bridges, and soon after news accounts of the find appeared, the City of Waco commenced a civil interpleader action in state court to determine ownership of the seized money. In March, pursuant to the IRS' motion, the case was removed to the United States district court. After removal, McLennan County, the county in which the City of Waco is located, was allowed to intervene to assert a claim for the money. The City of Waco also filed an amended interpleader complaint joining Bridges' father as a defendant to which the father never responded.

The case proceeded to trial before a jury where the various parties each attempted to establish their entitlement to the money. Bridges and Garcia contended that they had discovered the money after digging in the spot where Bridges had previously observed an unknown person burying an ice chest. The boys argued that they were the last persons in lawful possession of the money, and their entitlement to it, therefore, was superior to anyone except the lawful owner who had not come forth. Characterizing the action as a criminal forfeiture proceeding, Bridges and Garcia challenged the admissibility of the money and their contradictory statements as to the origin of the money. The boys contended that the money had been discovered

during an illegal search of the car and was, together with any other evidence obtained as a result of the illegal search, barred from introduction into the suit by the fourth amendment exclusionary rule.

The IRS took the position at trial "that the only issue before the Court [was] whether or not Mr. Bridges and Mr. Garcia were in lawful possession of the money." To this extent, the government's claim was contingent upon a finding that Bridges and Garcia were entitled to the $500,000. On appeal, however, the IRS has proffered an additional argument, one not presented below, that even if Bridges and Garcia did not have lawful possession, they did have "a sufficient interest in the money for a tax lien to attach as a result of the assessment."

McLennan County and the State of Texas both took sides opposite Bridges, Garcia and the IRS below. Both contended that the boys never had lawful possession of the money, and thus, relying on separate Texas statutes, asserted diverse claims of entitlement. The State of Texas based its claim on the Texas escheat statutes, Tex.Rev. Civ.Stat.Ann. articles 3272 and 3272a (Vernon 1968), which provide that the State's right to possess and enjoy the property of an absent and unknown owner ripens after a period of seven years. The County urged that it was entitled to retain the funds pursuant to Tex.Code Crim.Proc. Ann. art. 18.17 (Vernon 1977) which provides that "all unclaimed or abandoned personal property ... seized by any state or county peace officer in the State of Texas" should accrue to the county until the true owner appears.

Upon conclusion of the trial, the jury determined that Garcia and Bridges had obtained possession of the money "without the consent of the true owner, knowing or

believing that the owner could be found." On the basis of that finding, the district court ruled that the boys' possession was unlawful; and consequently, no part of the money was payable either to them or to the IRS. The court further held that as between the State and County, the money was payable to the County pursuant to the Texas statute conferring ownership of unclaimed property seized by "any state or county peace officer." The court also held that the search of the suitcase containing the money was unconstitutional,[2] but that the exclusionary rule need not be applied if the police in good faith believed that their search did not violate constitutional requirements. The court ruled that the police, in opening the suitcases, had acted in good faith because state law precedent allowed inventory searches of suitcases, and at the time that was no contravening federal law precedent. These appeals followed. We now consider the claims of each of the parties.

Finders Keepers, Losers Weepers?

Turning first to the errors asserted by Bridges and Garcia, we must initially determine if the district court erred in its application of the exclusionary rule to this proceeding. For different reasons, we conclude that the court properly refused to exclude the evidence of the money and the boys' statements from introduction at trial.

Throughout this proceeding, Garcia and Bridges have characterized this action as more akin to a quasi-

[2] Our holding, *infra*, that the exclusionary rule is not applicable int his civil action does not necessitate our passing on the issue of the constitutionality of the search. We note, however, that the Supreme Court's intervening decisions in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) and most recently in *Illinois v. LaFayette*, __ U.S. __, 103 S.Ct. __, 76 L.Ed.2d __, 51 U.S.L.W. 4829 (decided June 20, 1983) cast some doubt on the lower court's finding.

criminal forfeiture proceeding rather than a civil interpleader action. We disagree with this characterization.

Tex.Code Crim.Proc.Ann. art. 18.18 (Vernon 1977) provides for the forfeiture of contraband. In this case, however, neither the State of Texas, McLennan County, nor the City of Waco have ever claimed that the money in dispute was contraband nor have they instituted or taken any action pursuant to statute to forfeit the money. Indeed, only Garcia and Bridges have ever alleged the money to be contraband, a position which they later refuted. The record establishes that Bridges and Garcia, together with their possessions, were taken into police custody after the boys were arrested for various traffic violations. Only when the boys admitted shortly after arrest that the money was stolen did the Waco police take possession of the money by authority of Tex.Code Crim.Proc.Ann. art. 47.01 (Vernon 1979) which provides that "an officer who comes into custody of property alleged to have been stolen must hold it subject to the order of the proper court or magistrate." After an assortment of claims and the growth of publicity about the find, the City of Waco brought this civil interpleader action. The record does not support Bridges' and Garcia's claim that this action constituted a criminal forfeiture action.

Since we are not faced with a criminal or quasi-criminal forfeiture proceeding, but rather an action purely civil in nature, we need not address the legality of the search as the criminal law exclusionary rule is not thus applicable. In *Jonas v. City of Atlanta*, 647 F.2d 580 (5th Cir.1981), this court followed the rationale of the Supreme Court of the United States in finding that the exclusionary rule, whose origin rests in the fourth amendment, was not generally applicable in civil cases. We stated:

> We start with the proposition that the seizure of evidence in violation of the Fourth Amendment does not always preclude use of the evidence at a civil trial. Indeed, whether the exclusionary rule may ever bar the introduction of evidence in a civil trial is uncertain. "In the comoplex and turbulent history of the rule, the [Supreme] Court never has applied it to exclude evidence from a civil proceeding, state or federal." *United States v. Janis*, 428 U.S. 433, 447, 96 S.Ct. 3021, 3028-3029, 49 L.Ed.2d 1046 (1976).

647 F.2d at 587 (footnote omitted).

For the exclusionary rule to ever be applicable in an action of this nature, the deterrent benefit of the exclusion must outweigh the detriment to the public interest in providing fact finders with all relevant testimony. *See id.*, 647 F.2d at 587. In this case, the deterrent benefit justifying application of the rule would in no way be effectuated. Assuming the search was in fact illegal, the governmental entity responsible for violation, the City of Waco, would in no way be deterred since they make no claim to the money and, except for their role in bringing this interpleader action, are not a party to it. We do not believe, therefore, that the exclusionary rule is applicable; and on these separate grounds, we find no error in the district court's admission of such evidence.

Our finding that this action is more akin to a civil action rather than a quasi-criminal action similarly disposes of the second claim raised by Garcia and Bridges-that thae district court erred in adopting a "preponderance" burden of proof rather than a "reasonable doubt" standard. It is evident that the former, not the latter, burden is applicable to a civil action.

Finally, Bridges and Garcia allege that the district court erred in the form in which it submitted special issues to the jury in that such issues did not require the jury to determine whether the property discovered by the boys was abandoned. Failure to submit an issue of abandonment to the charge of theft can constitute reversible error. *See United States v. Shackelford,* 667 F.2d 422 (5th Cir.1982). We find no error, however, in the instruction.

Tex.Penal Code Ann. § 31.03 (Vernon 1974) defines "theft" and "unlawful appropriation." When an individual discovers property, he is guilty of theft if he "forms the intent to appropriate it, and does so, knowing and believing that the owner can be found." *Williams v. State,* 160 Tex.Cr.App. 330, 268 S.W.2d 670, 672 (1954). Consistent with Texas law, the court submitted the following special issues to the jury which were answered as follows:

> Question No. 1: Do you find from a preponderance of the evidence that James Dean Bridges intended to exercise control over the money in question, and did so, without the consent of the owner, knowing or believing that the owner of the money could be found? Answer "We do" or "We do not."
>
> We, the jury, answer we do.
>
> If you have answered Question No. 1 "We do not"; then answer Question No. 2. Otherwise, do not answer Question No. 2.
>
> Question No. 2: Do you find from a preponderance of the evidence that the money in question was "mislaid" at the time James Lee Bridges and Percy Garcia dug it up? You are instructed that the term "mislaid" means money

> which the owner intentionally places where he can again resort to it and then forgets where he placed it. Answer, "We do" or "We do not."
>
> We the jury answer _____

In special question Number 2, the court obviously considered "mislaid" to be synonomous with "abandoned property." The jury's affirmative finding on question Number 1 negated the question of abandonment since the issue of the status of the property had been resolved against Bridges and Garcia through the jury's determination that it had been stolen. The court did not err in the manner in which it submitted the special issues to the jury. Judgment denying the claim of Bridges and Garcia to the money is, therefore, affirmed.

Is Possession Really Nine-Tenths of the Law?

Having ascertained that the money was stolen, the district court was next required to determine whether the County or State was entitled to possession thereof. The parties assert that if the money is disposed of pursuant to Tex.Code Crim. Proc.Ann. art. 18.17 (Vernon 1977) McLennan County will obtain possession of the money. Article 18.17 provides that unclaimed personal property "seized by any *state* or *county* peace officer in the State of Texas" shall accrue to the county until the true owner appears. On the other hand, if art. 18.17 is inapplicable, then the money is subject to disposition to the State pursuant to Texas escheat statutes, Tex.Rev.Civ.Stat.Ann. articles 3272 and 3272a (Vernon 1968). The applicability of art. 18.17 is contingent upon whether the seizing officers, that is, the City of Waco police officers, are "state" officers within the meaning of art. 18.17. We are persuaded by the district

court's reasoning that in fact they are and, therefore, we affirm.

We agree with the district court that the language of art. 18.17 referring to "state or county peace officaers" is not used in reference to the *employers* of the officaers, a construction which the State urges, but rather is used in reference to the source of their power. As the court quite properly indicated, a statute should be construed to consider the consequences of a particular construction and presumably to effectuate a "just and reasonable result" as intended by the legislature. *Parr v. State*, 575 S.W.2d 522, 525 (Tex.Cr.App.1978); *Cole v. Texas Employment Commission*, 563 S.W.2d 363, 367 (Tex.Civ.App.—Fort Worth 1978, writ dism'd). If we accept the state's view that seizures by a *city* police officer are not within art. 18.17, then the result would be anomalous. Property seized by an officer employed by the state would qualify under art. 18.17 and would ultimately inure to the benefit of the county. If the same property, however, were seized by an officer employed by a city, it would be disposed of under the Texas escheat statutes and would ultimately inure to the benefit of the state. Consequently, the state would profit because the seizing officer was not its own employee but rather that of a city. This factor together with the separate status of peace officer afforded the *county* sheriff and constable under Tex.Code Crim.Proc. Ann. art. 2.12 (Vernon 1977) more clearly explains why the state legislature separately recognized "state or county peace officers" in art. 18.17 and supports the court's construction of this provision as indicating the source of the peace officer's power. Since Waco police officers derive their authority from the state, art. 18.17 was correctly applied by the district court.

Claims of the Internal Revenue Service

The final issue before us involves the validity of the tax lien levied by the Internal Revenue Service against the fund. At trial, the IRS contended that it waas entitled to levy on the money since Bridges and Garcia had "unlawful possession" of it at the time of the assessment. The question of "lawful possession" having been resolved contrary to the Government's interests, the IRS now presents for the first time on appeal the contention that the taxpayer, notwithstanding his unlawful possession, "had a sufficient interest in the money for a tax lien to attach as a result of the assessment and thus for the government to be entitled to the amount of the assessment."[3] Counsel for the United States has conceded that this theory of law was not presented to the lower court. The record and lower court's

[3] The IRS contends that even if Bridges and Garcia stole the money and were not otherwise in lawful possession, they exercised the requisite dominion or control over the property to support a tax levy. Their argument proceeds as follows.

> The fact that funds are obtained in an illegal manner does not necessarily mean that such funds do not represent taxable "income" to the possessor. In *James v. United States*, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961), the Supreme Court held that embezzled money in the hands of the embezzler is included within the category of illegally obtained income which is subject to the tax. The Court stated, "A gain constitutes taxable income when its recipient has such control over it, that, as a practical matter, he derives readily realizable economic value from it ...." 366 U.S. at 219-220, 81 S.Ct. at 1055-1056. *Accord, United States v. Rochelle*, 384 F.2d 748, 751-52 (5th Cir.1967), *cert. denied*, 390 U.S. 946, 88 S.Ct. 1032, 19 L.Ed.2d 1135 (1968) ("economic benefit" is the controlling factor in determining income). That Bridges and Garcia exercised control and received economic benefit from the money is undisputable. Accordingly, it is asserted that the Government's tax assessment is valid.
>
> Under this theory, the primary issue tried below—the stolen nature of the money—is irrelevant from the standpoint of the Government.

dismissal of the Government's claim simultaneous to its finding against the taxpayer makes this fact evident. McLennan County urges, therefore, that this new theory be disregarded since the failure of the IRS to present it below prejudiced the manner in which McLennan County would have presented its case.

As a general rule, an appellate court will not consider a new issue raised for the first time on appeal for the purpose of reversing the lower court's judgment. *hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941); *General Utilities and Operating Co. v. Helvering*, 296 U.S. 200, 56 S.Ct. 185, 80 L.Ed. 154 (1935); *In re Novack*, 639 F.2d 1274, 1276 (5th Cir.1981) (and cases cited therein). There are several reasons for this rule. As a procedural matter, the trial court is the forum vested with the duty of determining issues of fact. Fairness to the parties requires that each party be allowed the opportunity to present all evidence and arguments relevant to the issues to be determined in the trial forum. *See Hormel v. Helvering, supra.* Still another reason justifying such rule is founded in the need to promote judicial economy. The burden and practical effect of multiplicitous trial and appeal of issues requires that all issues be raised at the trial level. *See Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1364 (5th Cir.1983); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1144 (5th Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982). Finally, the facilitation accorded appellate review by a lower court's consideration of the legal issues and judicial resolution of factual disputes commands that such a rule not be disregarded lightly. *See Helvering v. Wood*, 309 U.S. 344, 349, 60 S.Ct. 551, 553, 84 L.Ed. 796 (1946).

Such a rule, however, is not universal. As the

Supreme Court stated in *Hormel v. Helvering, supra*, the rule barring appellate consideration of issues not raised below

> do[es] not announce an inflexible practice as indeed [it] could not without doing violence to the statutes which give to Circuit Courts of Appeals ... the power to modify, reverse or remand decisions not in accordance with law "as justice may require." There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

312 U.S. at 556-57, 61 S.Ct. at 721. The parameters of this exception have previously been identified by this court. Issues raised for the first time on appeal will not be considered absent a showing (1) that a pure question of law was posed and refusal to entertain such question would result in a miscarriage of justice, (2) that an interest of substantial justice was at stake, or (3) that there was no opportunity to object to an order upon its issuance. *In the Matter of First Colonial Corporation of America*, 693 F.2d 447, 449-50 n. 5 (5th Cir.1982); *In re Novack, supra*, 639 F.2d at 1276-77.

The Government contends that their present theory on appeal is purely legal in nature, is applicable to an undisputed set of facts and, if applied, promotes an important public policy that tax liabilities owing to the United States be paid. McLennan County refutes these claims. The County asserts that had the Government raised its present theory in the court below, the trial would have taken on a significantly different outlook. First, it would have

materially altered the alignment of the parties, the effect of which would have materially shifted the focus of the issue before the court. At trial, the primary issue was whether or not the money was in lawful possession of Bridges. McLennan County and the State contended it was not; Bridges, Garcia and the IRS contended it was. Resolution of the case turned on this issue. Under the Government's new theory, this issue is irrelevant.

More importantly, McLennan County contends that their presentation of evidence was materially prejudiced. The County asserts that had it been aware of the Government's new theory, it would have proffered evidence of a stipulation between the IRS and Bridges releasing him from tax liability in the event his interests in the money were terminated. The County argues that introduction of such a stipulation would have defeated the Government's claim since the validity of a tax lien rests upon a showing that taxes were in fact assessed. It is contended that the stipulation would have invalidated the tax lien, notwithstanding the Government's new theory. We also note generally that under Texas law, the release of the primary obligor, absent reservation as to other parties, may in some cases result in release of those parties owing through the primary obligor. *See generally*, 50 Tex.Jur.2d *Release* §§ 28-31.

We have previously stated that consideration of a new issue or legal theory for the first time on appeal requires the existence of "exceptional circumstances." *Payne v. McLemore's Wholesale & Retail Stores, supra*, 654 F.2d at 1144; *D. H. Overmyer Co. v. Loflin*, 440 F.2d 1213, 1215 (5th Cir.), *cert. denied*, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971). The burden of establishing exceptional circumstances clearly rests on the party asserting the new

issue. In this case, the United States has not met its burden. It has offered no reason why the theory it offers today was not presented below, even though it admits that its present theory is "consistent," albeit different, from that which it previously urged.

Furthermore, if additional facts would have been developed in the trial court had the new theory been presented there, we are required to apply the general rule barring consideration of new issues on appeal. *See id.*, 645 f.2d at 1145; *Higginbotham v. Ford Motor Co.*, 540 F.2d 762, 768 n. 10 (5th Cir.1976). McLennan County alleges the existence of the Government-taxpayer stipulation is a fact which would have been developed below. It is clear that the Government's new theory would have shifted the emphasis on the primary issue before the lower court. These considerations convince us that the United States has waited too late into the day to urge new grounds for reversal. Although a substantial sum of money is involved, the nature of this action and posture of this case (that is, the tardiness of the IRS) does not lead us to conclude that something as manifest as a miscarriage of justice would result from our refusal to consider the Government's new theory for the first time on appeal.

Finding no grounds for error, the judgment of the district court awarding the money to McLennan County, Texas, is AFFIRMED.

APPENDIX "D"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-77-CA-27

CITY OF WACO, TEXAS,

Plaintiff,

vs.

JAMES DEAN BRIDGES, ET AL,

Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Fred Shannon, District Judge, presiding, and the issues having been duly tried, and the Court having announced its Findings of Fact and Conclusions of Law into the record from the bench, and having supplemented same with a Memorandum Opinion delivered herewith,

IT IS ORDERED AND ADJUDGED,

(1) That an attorney's fee in the sum of Thirty-Five Thousand and No/100 ($35,000.00) Dollars for the CITY OF WACO for legal Services rendered by its attorneys shall be paid as provided by ORDER of this Court of date the 20th day of March, A.D., 1981.

(2) That JAMES DEAN BRIDGES and GILBERT BAILEY each take nothing on either of their claims to be

one (1) Model 1977 Ford (Thunderbird) automobile bearing vehicle identification number F7J87S145099F; and it is further ORDERED that the Motor Vehicle Division of the Texas Department of Highways and Public Transportation shall immediately transfer title to and possession of said motor vehicle to the SHERIFF OF THE COUNTY OF McLENNAN for sale pursuant to Article 18.17, Texas Code of Criminal Procedure, with the proceeds to be disposed of as hereinafter provided;

(3) That all money found in the possession of JAMES DEAN BRIDGES and PERCY GARCIA on the night of their arrest in Waco, Texas, and presently held in the registry of this Court, or in the form of exhibits before this Court, or which is otherwise before this Court, shall be delivered to the COUNTY TREASURER OF THE COUNTY OF McLENNAN for disposition pursuant to Article 18.17, Texas Code of Criminal Procedure;

(4) That the certain moneys found in the respective wallets of JAMES DEAN BRIDGES and PERCY GARCIA on the night of their arrest in Waco, Texas, and presently held in the registry of this Court be and the same are hereby ORDERED to be delivered to them, as follows:

(a) One and 07/100 ($1.07) Dollars to be delivered to JAMES DEAN BRIDGES, and

(b) Four Hundred Ninety-nine and 97/100 ($499.97) Dollars to be delivered to PERCY GARCIA, and none other;

(5) That all personal items taken from JAMES DEAN BRIDGES and PERCY GARCIA on the night of their arrest in Waco, Texas, and presently held in the

registry of this Court shall be returned to them except as otherwise ordered herein;

(6) That the money held in the registry of this Court and invested under a previous order in an interest bearing account and all accumulated interest thereon shall be delivered to the COUNTY TREASURER OF THE COUNTY OF McLENNAN, subject to disbursements from said funds as hereinabove ordered, the money thus delivered to be disposed of as hereinafter provided;

(7) That JAMES DEAN BRIDGES and PERCY GARCIA each take nothing by their claims, and each of same are hereby in all things denied, except as otherwise ordered herein;

(8) That the UNITED STATES OF AMERICA take nothing by its claim, and same is hereby in all things denied;

(9) That JAMES E. HIROMS, APRIL JEAN HIROMS, and JOHN ROSE, each of them having wholly made default herein, it is accordingly ORDERED that they, and each of them take nothing herein;

(10) That all other parties properly joined and appearing before the Court take nothing by their claims herein, and same are hereby in all things denied;

(11) That all other property in the registry of this Court not specifically disposed of he. in be, and the same shall be delivered to the SHERIFF OF THE COUNTY OF McLENNAN for disposition pursuant to Article 18.17, Texas Code of Criminal Procedure;

(12) That all costs be, and the same are hereby assessed against JAMES DEAN BRIDGES and PERCY GARCIA, for which let execution issue; and

(13) That all relief not specifically granted herein be, and the same is hereby in all things specifically denied.

Signed and entered this 8 day of March, 1982.

/S/ FRED SHANNON
Fred Shannon,
United States District Judge

APPENDIX "E"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL ACTION NO. W-77-CA-27

CITY OF WACO, TEXAS,

Plaintiff,

vs.

JAMES DEAN BRIDGES, ET AL,

Defendants.

MEMORANDUM OPINION

This opinion is to supplement the Findings of Fact and Conclusions of Law set out by the Court in pronouncing its judgment from the bench at the end of the trial.

This case involves the possession and ownership of approximately $500,000.00 in United States currency.

In late January, 1977, James Dean Bridges, John Rose, and Percy Arnold Garcia dug up an ice chest containing approximately $500,000.00 in United States currency on the ranch of Bridges' father, James Hirom, near Alice, Texas.

The three young men then went to Rose's house and transferred the currency to two suitcases he provided. Shortly thereafter, Rose dropped off Bridges and Garcia at the Alice, Texas bus station. Bridges and Garcia boarded

a bus for Dallas, Texas, and upon their arrival checked into a Dallas hotel. While in Dallas, the boys convinced a Mr. Gilbert Bailey to purchase an automobile in his name for them. Mr. Bailey did so and the boys left Dallas headed, they thought, for Ohio. The boys ended up in Waco, Texas. Shortly after their arrival, Waco police officers stopped them for a minor traffic violation. Neither Bridges nor Garcia had a valid driver's license. They gave police conflicting stories as to the ownership of the automobile, the whereabouts of the owner and their places of residence. The name "Gilbert Bailey" appeared on the temporary paper license plate on the vehicle. At this point, Waco police had probable cause to believe the boys to be engaged in criminal activity, and took them into custody. Pursuant to standard police practices, the boys and the contents of the automobile were searched. Discovered in the trunk of the automobile were the two suitcases. Without first obtaining a valid search warrant, the police opened the suitcases in order to inventory the contents. The money found therein was placed in the custody of Waco police along with several other items of personal property found on the two young men.

Soon after news accounts of the find appeared, the City of Waco filed an interpleader action in the District Court of McLennan County and deposited the money into the registry of the court. The city named Bridges, Garcia, the State of Texas, and the Internal Revenue Service as defendants. Shortly thereafter, the County of McLennan filed a plea in intervention. An IRS motion to remove the suit to this court was granted.

Bridges and Garcia base their claim upon Texas' law regarding lost, mislaid, and abandoned property. The State's claim rests upon the Texas escheat statutes. TEX.

REV. CIV. STAT. ANN. arts. 3272, 3272a (Vernon 1968). The County's claim is made pursuant to the Texas statute regarding the disposition of unclaimed property in police custody. TEX. CODE CRIM. PRO. ANN. art. 18.17 (Vernon 1977). IRS' claim is contingent upon the boys' claim insofar as it is a tax assessment against unearned income.

After a trial on the merits, the jury found that James Dean Bridges intended to exercise control over the money, without the consent of the owner, knowing or believing that the owner could be found. At trial Bridges and Garcia attempted to suppress the evidence as the fruits of an illegal search. The suppression was denied.

This opinion will consider: (1) the legality of the search; (2) the exclusionary rule and the admissibility of the evidence; (3) Bridges', Garcia's and the IRS' claims; (4) the claim of the State of Texas; and (5) the claim of McLennan County.

I. THE LEGALITY OF THE SEARCH

Warrantless searches are *per se* unreasonable. E.G. *Payton v. New York*, 445 U.S. 573 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967); *see also Jones v. United States*, 357 U.S. 493, 498-99 (1958). The only exception to the warrant requirement germane herein is the inventory exception articulated in *South Dakota v. Opperman*, 428 U.S. 364, 372-74 (1976). *See also United States v. Kelehar*, 470 F.2d 176, 178 (5th Cir. 1972); *United States v. Ducker*, 491 F.2d 1190, 1192 (5th Cir. 1974).

However, reliance on these cases is misplaced. The Supreme Court has expressly rejected the proposition that

the inventory exception applicable to automobiles extends to anything found within an automobile during the warrantless search. *Robbins v. California*, 101 S.Ct. 2841, 2845 (1981); *Arkansas v. Sanders*, 442 U.S. 753, 763-64 (1979); *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977). The searches involved in *Robbins*, *Sanders*, and *Chadwick* took place prior to the search in the instant case, and point to the conclusion that the warrantless search of the suitcases, after the police had reduced them to their custody and control, was an illegal search under the Fourth Amendment. *Robbins v. California*, 101 S.Ct. at 2845.

II. THE EXCLUSIONARY RULE AND THE ADMISSIBILITY OF THE EVIDENCE

The exclusionary rule is not a constitutional requirement. Rather, it is a judicially recognized evidentiary rule which mandates the exclusion of illegally seized items from evidence. *United States v. Williams*, 622 F.2d 830, 841 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 946 (1981); *United States v. Calandra*, 414 U.S. 338, 348 (1974). However, exclusion of items seized in violation of the Fourth Amendment is not always required. *United States v. Peltier*, 422 U.S. 531, 537-39 (1975).

The purpose of the exclusionary rule is to deter unreasonable police conduct. *Id.* at 542. Evidence seized in the course of an admittedly illegal search need be suppressed "only if it can be said that the law enforcement officer had knowledge, or may be properly charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542. Therefore, the exclusionary rule is not necessarily coextensive with the Fourth Amendment. In *Williams*, 662 F.2d at 841, the Fifth Circuit adopted the "good faith" exception to the Fourth

Amendment. The application of the "good faith" exception hinges on the reasonableness of the officer's belief that he was acting pursuant to law and that the evidence seized would be admissible at trial. *Id.* at 841. If the police officers in this case believed in good faith that they were acting within the bounds of the law, the money the officers found during the inventory of the suitcases would be admissible in evidence.

As of the date of the instant case, the Texas Court of Criminal Appeals had not made a definitive statement on the allowable scope of an automobile inventory search. However, in *Robinson v. State*, 541 S.W.2d 608 (Tex. Crim. App. 1976), *cert. denied*, 429 U.S. 1109 (1977) the Court held that the routine inventory of an automobile, including the glove compartment, did not violate the Fourth Amendment. *Id.* at 611. Similarly, the United States Court of Appeals for the Fifth Circuit upheld the inventory search of a briefcase found on the frontseat of an impounded automobile, *United States v. Davis*, 496 F.2d 1026, 1032 (5th Cir. 1974), as well as the inventory search of a suitcase found in the hotel room of an arrested suspect. *United States v. Lipscomb*, 435 F.2d 797, 800-01 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).

The testimony of Waco police at trial established that the inventory in this case was conducted pursuant to routine police practice. It cannot be said that, in light of the available case law, the police knew or can be charged with knowledge that the scope of the search exceeded constitutional boundaries.

This court concludes that the exclusionary rule should not be applied to the facts of this case.

III. BRIDGES', GARCIA'S, AND THE IRS' CLAIMS

The evidence at trial shows that Bridges and Garcia were in possession of the money when it was seized by the police. Possession of lawful currency is *prima facie* evidence that the person in possession is entitled to the property. *United States v. Wright*, 610 F.2d 930, 939 (D.C. Cir. 1979).

However, the evidence in the case convinced the jury that the boys had, in effect, stolen the money. Indeed, Bridges had at one time represented to the IRS that he had in fact stolen it. Consequently, they are not entitled to the funds.

IV. THE CLAIM OF THE STATE OF TEXAS

The State of Texas bases its claim to the money on the Texas escheat statutes. TEX. REV. CIV. STAT. ANN. arts. 3272, 3272a (Vernon 1968). The State's right to possess and enjoy the property of an absent and unknown owner ripens after a period of seven years. *Id.* at art. 3272. Thus, because the State may be entitled to the funds in the future, it has a present interest in contesting all claims thereto. Absent clear authority to the contrary, this Court holds that the State has the right, and, indeed, the obligation, to protect such funds from spurious claims, not only in the public interest, but also in the interest of the true owner. As between the invalid claim and the State's claim, the State has the right to cause the funds to remain where they are situated to await passage of the required seven years or the earlier proof of a valid claim thereto. Meantime, the State has no present right to possession.

V. THE CLAIM OF McLENNAN COUNTY

The County of McLennan urges that it is entitled to retain the funds pursuant to Article 18.17 of the Texas Code of Criminal Procedure.

In weighing the claims of the County and the State, the issue is whether the money and property is to be disposed of under Art. 18.17, Texas Code of Criminal Procedure (the "Code") relating to abandoned or unclaimed property seized by peace officers, on under the Texas escheat statute, Art. 3272 V.A.S. If no one steps forward to claim the money and property, it will ultimately go to the county if it is disposed of under the Code, or to the State if it is disposed of under the escheat statute.

The money and property came into *custodia legis* as a result of warrantless arrests made by Waco city police officers. Their power to make the arrests was derived from Arts. 14.01 or 1403 of the Code, which authorizes "peace officers" to make arrests without warrant under certain circumstances. Art. 18.17 of the Code provides for the disposition of unclaimed and abandoned property seized by any "state or county peace officer..." (emphasis added). The Waco policemen who made the arrests were not "county" peace officers. Therefore, the Court must determine whether they were "state" police officers.

Texas cases indeed support the rules of construction urged by the State. To some degree, they have been merged into the Texas Code Construction Act. TEX. REV. CIV. ST. ANN. art. 54 *et seq.* (Vernon 1980).

The Act provides that it is presumed that the entirety of a statute was "intended to be effective." TEX. REV.

CIV. STAT. ANN. art. 5429b-2, §3.01 (Vernon 1980). An additional argument the State could have advanced is that the use of the disjunctive in the phrase "state or county peace officers" in Art. 18.17 signifies that "county" peace officers are not "state" peace officears; that the words "state" and "county" refer to the employers of the officers rather than to the source of their power; and that city policement are thus "city" peace officers rather than "state" peace officers. This argument is an application of a maxim "noscitur a sociis" ("one is known by his companions") whereby a reader may ascertain the meaning of a doubtful word from the words associated with it. In the instant case, the use of the word "county" may illuminate the meaning of the word "state."

Nonetheless, a more important statutory rule mandates that the County prevail here. §3.03 of the Code Construction Act (which applies in the construction of the Code of Criminal Procedure) provides that in construing a statute (whether or not the statute is ambiguous on its face) a court may consider "the consequences of a particular construction." In applying this rule, the Texas courts have presumed that the Legislature intends "a just and reasonable result" when it enacts a statute. *Parr v. State*, 575 S.W.2d 522 (Tex.Crim.App. 1978). This legislative directive is discussed in *Cole v. Texas Employers Commission*, 563 S.W.2d 363 (Tex.Civ.App.—Fort Worth 1978, writ dism'd), where the Court refused to hold that the trial court was without jurisdiction to consider a worker's prematurely filed appeal from an order of the Texas Employment Commission despite the language of the Worker's Compensation Act that such appeals are to be filed within ten (10) days after the decision of the Commission has become final "and not before." The Court said:

> "We recognize that a rather remarkable change was made in the rules relating to statutory construction by...(the Code Construction Act)...To be observed is that it is presumed that in enacting legislation, the Legislature intended a just and reasonable result...Whether or not a statute be deemed ambiguous on its face, we are obliged in its construction, to consider...the consequences of any particular construction."

The Court held that denying a worker his day in court because of the premature filing of an appeal would be unjust and unreasonable. It ruled that the appeal was not defeated by its prematurity, despite the plain words of the statute.

The construction urged by the State will lead to consequences which are unreasonable and unjust. Under that construction, property seized by an officer employed by the State is disposed of under Art. 18.17 and may ultimately inure to the benefit of the County. But if the same property is seized by officer employed by a city, it will be disposed of under the Texas escheat statutes, and may ultimately inure to the benefit of the State. Thus, under the State's construction, the State may profit because the seizing officer is not its own employee but rather that of a city.

Turning specifically to the significance of the use of the word "county" in Art. 18.17, it is clear that in making arrests city officers act under the police power of the State. In *City of Dallas v. Smith*, 107 S.W.2d 872 (Tex. Com. App. 1937) the Court said that "...a city exercising police powers delegated to it is exerting *the power of government of the State within the city.*" *Id.* at 875 (emphasis added). In *Mayes v. Wichita Falls*, 403 S.W.2d 852 (Tex. Civ. App.—Fort Worth 1966, ref. n.r.e.) the Court, in discussing the

doctrine of respondent superior in the context of a city's governmental immunity claim, said "The theory is that the action of the agent is not merely for the municipality but *for the state* itself". (Emphasis added). *See also Town of Ascaret v. Villalobos,* 223 S.W.2d 945 (S.C. 1945); *City of New Braunfels v. Waldschmidt,* 207 S.W. 903 (S.C. 1918); *Peck v. City of Austin,* 22 Tex. 261 (1858); and *Holt Civic Club v. City of Tuscaloosa,* __ U.S. __, 99 S.Ct. 383 (1978). Further, Art. 4413 (29aa) VAS provides that the State is to certify the qualifications of peace officers and forbids anyone from accepting (except on a probationary basis) or retaining employment as a peace officer without state certification.

The Court recognizes that the positions of sheriff and constable are the only two offices named in Art. 2.12 of the Code of Criminal Procedure's enumeration of "peace officers" that are also provided for in the Texas Constitution. Thus, in a constitutional sense, sheriffs and constables are county officers rather than State officers. In addition, *AG Opinion* No. MW111 (1979) specifically advised that sheriffs as constitutional officers are exempt from Art. 4413 (29aa), TEX. ANN. CIV. STAT. (Vernon 1980), requiring certification of peace officers.

Because the Waco police officers derived their power to arrest from the State and could only act as peace officers on the basis of State certification, they are "state police officers." If the word "state" alone had been used in Art. 18.17 to describe peace officers to whom it applies, its application to sheriffs and constables might be open to question. However, the avoidance of unintended and unjust consequences warrants the construction that Art. 18.17 is applicable here. The constitutional status of the office of sheriff explains the need for the use of the word "county"

in the phrase "state or county". Therefore, judgment should be entered that the money and property in issue be disposed of under Art. 18.17. The effect of this holding is that counties get the benefit of unclaimed property seized by peace officers whereas the state gets the benefits of unclaimed property not seized by officers.

Signed and entered this 8 day of March, 1982.

Fred Shannon, United States District Judge

APPENDIX "F"

Art. 18.17 [332a] Disposition of abandoned or unclaimed property

(a) All unclaimed or abandoned personal property of every kind, except whiskey, wine and beer, seized by any state or county peace officer in the State of Texas which is not held as evidence to be used in any pending case and has not been ordered destroyed or returned to the person entitled to possession of the same by a magistrate, which shall remain unclaimed for a period of 30 days shall be delivered for sale to the purchasing agent of tahe county in which the property was seized. If the county has no purchasing agent, then such property shall be sold by the sheriff of the county.

(b) The purchasing agent or sheriff of the county, as the case may be, shall mail a notice to the last known address of the owner of such property by certified mail. Such notice shall describe the property being held, give the name and address of the officer holding such property, and shall state that if the owner does not claim such property within six months from the date of the notice such property will be sold and the proceeds of such sale, after deducting the reasonable expense of keeping such property and the costs of the sale, placed in the county treasury.

(c) If the owner of such property is unknown or if the address of the owner is unknown, then the purchasing agent or the sheriff, as the case may be, shall cause to be published once in a paper of general circulation in the county a notice containing a description of the property held, the name of the owner if known, the name and address of the

officer holding such property, and a statement that if the owner does not claim such property within six months from the date of the publication such property will be sold and the proceeds of such sale, after deducting the reasonable expense of keeping such property and the costs of the sale, placed in the county treasury.

(d) The sale of any property hereunder shall be preceded by a notice published once at least three weeks prior to the date of such sale in a newspaper of general circulation in the county where the sale is to take place, stating the description of the property, the names of the owner if known, and the date and place that such sale will occur. If the purchasing agent or sheriff, as the case may be, shall consider any bid as insufficient, he need not sell such property but may decline such bid and reoffer such property for sale.

(e) The real owner of any property sold shall have the right to file a claim to the proceeds of such sale with the commissioners court of the county in which the sale took place. If the claim is allowed by the commissioners court, the county treasurer shall pay the owner such funds as were paid into the treasury of the county as proceeds of the sale. If the claim is denied by the commissioners court or if said court fails to act upon such claim within 90 days, the claimant may sue the county treasurer in a court of competent jurisdiction in the county, and upon sufficient proof of ownership, recover judgment against such county for the recovery of the proceeds of the sale.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967 60th Leg., p. 1737, ch. 659 § 15, eff. Aug. 27, 1967; Acts 1973, 63rd Leg., p. 982, ch. 399 § 2(E), eff. Jan. 1, 1974.

§ 31.03. Theft

(a) A person commits an offense if, with intent to deprive the owner of property:

(1) he obtains the property unlawfully; or

(2) he exercises control over the property, other than real property, unlawfully.

(b) Obtaining or exercising control over property is unlawful if:

(1) the actor obtains or exercises control over the property without the owner's effective consent; or

(2) the property is stolen and the actor obtains it from another or exercises control over the property obtained by another knowing it was stolen.

(c) For purposes of Subsection (b)(2) of this section:

(1) evidence that the actor has previously participated in recent transactions other than, but similar to, that which the prosecution is based is admissible for the purpose of showing knowledge or intent and the issues of knowledge or intent are raised by the actor's plea of not guilty;

(2) the testimony of an accomplice shall be corroborated by proof that tends to connect the actor to the crime, but the actor's knowledge or intent may be established by the uncorroborated testimony of the accomplice.

(d) An offense under this section is:

(1) a Class C misdemeanor if the value of the property stolen is less than $5;

(2) a Class B misdemeanor if:

(A) the value of the property stolen is $5 or more but less than $20; or

(B) the value of the property stolen is less than $5 and the defendant has previously been convicted of any grade of theft;

(3) a Class A misdemeanor if the value of the property stolen is $20 or more but less than $200;

(4) a felony of the third degree if:

(A) the value of the property stolen is $200 or more but less than $10,000, or the property is one or more head of cattle, horses, sheep, swine, or goats or any part thereof under the value of $10,000;

(B) regardless of value, the property is stolen from the person of another or from a human corpse or grave; or

(C) the value of the property stolen is less than $200 and the defendant has been previously convicted two or more times of any grade of theft;

(5) a felony of the second degree if the value of the property stolen is $10,000 or more.